NO. 47873-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GARY LEE NOBLE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00548-9

BRIEF OF RESPONDENT

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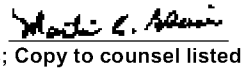
SERVICE		
	Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 Email: tweaver@tomweaverlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 12, 2016, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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3. Whether counsel was ineffective for failing to offer an abandoned premises defense on a lesser-included offense of criminal trespass first degree?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gary Lee Noble was charged by original information filed in Kitsap County Superior Court with burglary in the second degree and possession of controlled substance, methamphetamine. CP 1. A first amended information later added a third count, possession of stolen property in the third degree. CP 7. A second amended information was filed which omitted the drug possession count. CP 10. Earlier the same day as the filing of the second amended information, Noble had entered a plea of guilty to the drug possession count (count II) of the first amended information. CP 13. As voir dire was to begin, the trial court advised the jury of the two remaining charges reading from the second amended information. 1RP 117.

After Noble had expressed his intention to plead guilty to count II of the first amended information, the state noted a need to "fix" the information because of the plea. 1RP 69. The trial court allowed that "I can read this information [the first amended] and just cross out count 2." Id. Before the plea was taken, the second amended information was submitted for filing in open court. 1RP 70-71. The trial court responded "[w]hy don't we take the plea, and then I'll arraign on the Second Amended." 1RP 71. The trial court accepted the plea and ordered Noble held without bail on that conviction. 1RP 74. From there, the trial court and the parties proceeded to consideration of motions in limine. 1RP 75. The trial court and the parties never returned to the second amended for arraignment.

During motions in limine, the parties argued at length over the propriety of instructing the jury on an abandonment defense to the burglary charge. 1RP 89 *et seq.* The trial court reviewed the case law and ruled that it was bound by the cases out of Division II of the Court of Appeals. 1RP 95. The court denied the defense of abandonment. Id. After more discussion, the trial court denied the use of the word abandoned. 1RP 101.

The jury was instructed on the lesser included offense of criminal trespass first degree. CP 26. Noble was acquitted of the burglary charge;

he was found guilty to criminal trespass and possession of stolen property. Noble was sentenced within the standard range for the felony drug possession with the two misdemeanor convictions running concurrent to each other but consecutive to the felony. Noble timely appealed.

B. FACTS

The subject property was a mobile home owned by Ruban Allen. He lives just two doors the street and had purchased the place after the previous owner had passed away. 2RP 270-71. He has owned the property for five or six years and is intent on fixing the place up to resell it. 2RP 271. He believes the place is in good shape structurally but needs a lot of cleaning up. Id. no one has actually lived in the house since the previous owner passed away. 2RP 272. There is a shed out back where Mr. Allen stores appliances while he works on the house. 2RP 276. Mr. Allen keeps up the yard. 2RP 277. Power and water are on to the house but the water is off. Id.

One day in May, a neighbor called Mr. Allen and told him that there was hammering going on in the house. Id. Mr. Allen went to investigate. Id. He walked around the house noting that the shed door was damaged. 2RP 282. Mr. Allen called the police. 2RP 284. While waiting for the police, he continued to walk around outside. Id. He found, among other things, that a grate over the "doggy door" had been moved.

2RP 285. The grate had been placed to stop raccoons and other animals from getting in. Id. Mr. Allen heard a noise and saw a guy come walking around the corner of the house. 2RP 287. Mr. Allen asked the guy what he was doing and the guy responded that he had chased some teenagers away that were trying to break in. 2RP 288. Mr. Allen had never seen the man before and that day he saw no one else around the house. Id. Mr. Allen told the man to leave and the man walked away carrying a bundle. 2RP 289.

Police arrived and Mr. Allen pointed out where the man had gone. Id. He described the person to the police. 2RP 290. Police pursued and arrested the man. Id. Mr. Allen was driven to the place of the arrest and identified the man. Id. In court, Mr. Allen identified the defendant as the man. 2RP 291. Inside, he found curtains nailed up over the windows. Id. A lighted Christmas ornament was plugged in for light and a makeshift bed was on the floor. Id. It looked like someone had cooked in the kitchen. 2RP 293. Tools Mr. Allen used around the place were missing. 2RP 295. He identified his tools in court. Id.

Bremerton police officer Trever Donnelly testified that he responded to Mr. Allen's call. 2RP 343. He spoke with Mr. Allen. 2RP 345. Upon going after the direction that Mr. Allen pointed out, officer Donnelley soon saw a person matching the description. 2RP 346. He

detained the person. 2RP 347. The man identified himself as Kelly Lyden, 2RP 348, and officer Donnelly was aware from briefing that that was an alias for Gary Noble. 3RP 371. The person was searched and the items he was carrying were taken. 2RP 350. Officer Donnelly identified Noble in open court as the person he had detained that day. 3RP 377. Baggies found on mr. Noble's person matched baggies found in mr. Allen's house. 3 RP 380.

III. ARGUMENT

A. THE FAILURE TO ARRAIGN NOBLE ON THE SECOND AMENDED INFORMATION DID NOT DIVEST THE TRIAL COURT OF JURISDICTION AND CAUSED NOBLE NO PREJUDICE.

Noble argues that his drug possession charge must be dismissed because the second amended information omitted that offense. This claim is without merit because Noble need not be arraigned on an amended information for the trial court to retain subject matter jurisdiction. On this record, the second amended information caused no prejudice; no action was taken under the second amended information.

The allowing of an amendment of an information is reviewed for abuse of discretion. *State v. Hockaday,* 144 Wn.App. 918, 925, 184 P.3d 1273 (2008). A defendant may not be tried for an offense not charged. Id. at 925. But the state is allowed to freely amend an information. CrR 2.1

(d) provides

> The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

There is no error in allowing an amended information unless the defendant can show prejudice. *State v. Murbach,* 68 Wn.App. 509, 511, 843 P.2d 551 (1993). Prejudice is found where the amended information leaves the defendant inadequate time to prepare for a new charge. Id. at 512. The remedy for that situation is continuance. Id. Pretrial amendment of an information to include a more serious crime and thereby increase punishment is not sufficient prejudice to warrant relief. Id., *citing State v. Pelkey,* 109 Wn.2d 484, 745 P.2d 854 (1987) (mid-trial amendments may only charge a lesser included offense or the same offense in a lesser degree). The so-called *Pelkey* rule forbids amendment after the state has rested.

Crucial to this case is the simple observation that we here deal with an amendment, not an initial charge. To amend is to "change or alter for the better; to alter by modification, deletion or addition." Black's Law Dictionary, 5th Ed. It certainly does not mean to commence or initiate as is the case with an initial information. Here, the original information was not dismissed and the matter later refiled by a new information. After filing and arraignment on the first amended information, the charges did

not change. Nobel was tried on two charges from the first amended information and pled guilty to the third charge. The state filed the second amended only as a merely formal response to Noble's plea in an attempt (perhaps vain at this point) to clarify the record.

Nor is the failure to arraign Noble error. "The State may amend the information without arraignment if substantial rights of the defendant are not prejudiced or if the amendment is merely formal." *State v. Emery,* 161 Wn.App. 172, 201, 253 P.3d 413 (2011); *affirmed* 174 Wn.2d741 (2012) (citation omitted). Moreover, the defendant bears the burden of showing prejudice thereby. Id. Arraignment is not primary to due process. Thus

> Absence of arraignment alone does not rise to a due process violation. The harm occurs when absence of arraignment results in failure to give the accused and his counsel sufficient notice and adequate opportunity to defend.

State v. Alferez, 37 Wn.App. 508, 525, 681 P.2d 859 (1984). Indeed, where two counts of burglary were added to an information and no arraignment was had

> We find no prejudice from non-arraignment and further find defendant waived his right to be arraigned. The court expressly found both defendant and his counsel had actual notice of the burglary charges in advance of trial. The record shows defendant had a full trial on the merits as if a plea of not guilty had been entered on the two counts. He proceeded to trial without objection and without asking for a continuance after announcing he was ready to proceed to trial. By this conduct defendant effectively waived his right to a formal arraignment.

State v. Anderson, 12 Wn.App. 171, 173, 528 P.2d 1003 (1974) (citation omitted). Due process, then, is concerned with notice and ability to defend, not with formality. *See State v. Barnes,* 146 Wn.2d 74, 82, 43 P.3d 490 (2002) ("The primary purpose of [a charging] document is to supply the accused with notice of the charge that [the accused] must prepare to meet.").

Similarly, in the present case, the failure to arraign Noble on the second amended proves no prejudice. Here, the amendment was "merely formal." And, the *Anderson* Court's holding is apt to the present case. Here, the record shows that Noble and his counsel had actual notice of the filing of the second amended. Noble had a full trial on the merits of his case as if pleas of not guilty had been taken on the two charges tried. He did not object. He effectively waived arraignment on the second amended information. Noble cannot show that substantial rights were prejudiced. *See State v. Gosser,* 33 Wn.App. 428, 435, 656 P.2d 514 (1982) ("Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial."); *see also State v. Jennen,* 58 Wn.2d 171, 174-75, 361 P.2d 739 (1961) (amendment changed name of victim, not arraigned thereon, no prejudice).

Thus, it can be seen that the filing of the second amended in this

case caused no error. But, Noble argues that *State v. Corrado* 78 Wn.App. 612, 898 P.2d 860 (1995) warrants reversal and dismissal without prejudice. *Corrado* does not change the above analysis and is readily distinguishable. There, the state had dismissed the prosecution without prejudice because of a missing witness. About a month later, Corrado was rearraigned but no new information was filed or served. Id. at 613. The Court of Appeals noted that a trial court acquires subject matter jurisdiction when an indictment or information is filed. Id. at 615. That jurisdiction is lost upon dismissal. Id. Thus, in the case, jurisdiction was had, then lost, and not re-acquired. Id. at 616. Corrado's conviction was vacated.

Of course the key fact in *Carrado* was the dismissal of the action. This was not a situation, as in the present case, where an existing information was amended. In *Carrado*, there simply was no case subsequent to the dismissal and no case was ever refiled. But in the present case there was no dismissal; the trial court never lost jurisdiction. On this point, then, *Corrado* does not apply to the present case.

Similarly, *State v. Franks,* 105 Wn.App. 950, 22 P.3d 269 (2001), has dubious application to the present situation. There, two sisters were implicated in a robbery. The state erroneously charged one sister, naming her in the caption but using the other sister's name in the body of the

information. The *Franks* Court criticized the *Carrado* Courts' resort to subject matter jurisdiction, noting that such jurisdiction goes to the type of controversy that the court is entitled to decide under its constitutional grant of authority and is not "dependent upon compliance with procedural rules." Id. at 955; *see* Washington Constitution article 4, section 6. On this issue the court held

> Superior courts do not "acquire" or "lose" their subject matter jurisdiction over juvenile felony cases based upon procedural events and errors in those particular cases. Here, there is no question that the superior court had the power to act in this juvenile felony case, and therefore there is no issue as to subject jurisdiction. The only question is whether the charging document adequately informed Dominique Franks of the charges she had to prepare to defend against.

The Court of Appeals then went on to reverse the conviction under *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), because the information was defective in identifying the person charged.

In *State v. Barnes,* 146 Wn.2d 74, 43 P.3d 490 (2002), the Supreme Court considered an argument that the trial court was divested of subject matter jurisdiction by the failure to file an amended information. There an oral amendment added a charge; arraignment thereupon was had but the amended information was never filed. Id. at 77. The Supreme Court framed the question

> The question presented in this case is whether a superior court loses subject matter jurisdiction when the State does not file an amended information adding a second count, even though it was

> approved by the court and was used by the court as the case proceeded to trial before a jury which convicted Petitioner of the second count charged in the amended information.

Id. at 76. The answer was no and the Court affirmed. Id. at 90. The court held that "[t]he State's failure to file the amended information after it was approved by the court raises serious questions of efficiency, but it did not divest the superior court of jurisdiction over the additional count in the amended information charging resisting arrest." Id. at 87; *accord State v. Eaton,* 164 Wn.2d 461, 191 P.3d 1270 (2008). The Court observed that "[j]urisdiction becomes an issue only if no offense is charged at all." Id. at 86.

Noble was charged with three crimes before trial by the first amended information. The trial court had never lost jurisdiction following the filing of the initial information. He does not challenge the sufficiency of any of the three informations. He does not claim that he had inadequate notice of the charges that he had to defend. Although the procedures in this case are hardly a model of efficiency, there was no error that demands reversal. Noble's claim fails.

B. THE STATUTORY CRIMINAL TRESPASS DEFENSE OF ABANDONMENT IS NOT A DEFENSE TO BURGLARY.

Noble next claims that that the trial court erred in denying his request for an instruction on the defense of abandonment under the

burglary count. This claim is without merit because the statutory defense advanced is expressly limited to criminal trespass prosecutions.

The trial court ruled that Noble could not use abandonment as a defense to burglary because the trial court is bound by authority of this division of the Court of Appeals. 1RP 98-99. Under this Court's precedent, the defense is limited to criminal trespass charges. Thus the trial court ruled that the defense was unavailable as a matter of law.

A trial court's refusal to give a jury instruction is reviewed de novo when the refusal is based on a matter of law. *State v. Cordero,* 170 Wn.App. 351, 369, 284 P.3d 773 (2012). On such issues, the appellate court considers the instructions as a whole, considering the challenge in context. Id. at 370. "The jury instructions as a whole must correctly apprise the jury of the law and enable a defendant to argue his defense theory." Id., *citing State v. Rice*, 102 Wash.2d 120, 123, 683 P.2d 199 (1984).

Noble relies on *State v. J.P.,* 130 Wn.App. 887, 125 P.3d 215 (2005). This reliance is ultimately unavailing. In *J.P.*, Division III of the Court of Appeals upheld a trial court ruling allowing the abandonment defense in a burglary prosecution. Id. at 895. Precedent for this holding was found in *City of Bremerton v. Widell,* 146 Wn.2d 561, 51 P.3d 733 (2002). But *Widell* is a case considering defenses to trespass, not

burglary. The passage from *Widell* that is quoted in *J.P.* merely explains the nature and operation of the statutory defenses to trespass and nowhere in the decision is burglary discussed. Undaunted, Division III does discuss burglary in *J.P.,* noting that criminal trespass is a lesser included offense of burglary. Id. at 895. Then, since trespass has a statutory defense that negates the element of unlawful entering or remaining, and since burglary has the same element, application of the statutory trespass defenses have the same effect on burglary. From this reasoning, the *J.P.* Court leaps to the conclusion that as a matter of law a trespass statutory defense may be applied to a burglary prosecution. No authority is cited that establishes that an express statutory provision allowing a defense to one crime may be imported and applied to a different crime.

Moreover, the *J.P.* Court's discussion of the trespass defense can be seen as a discussion that is unnecessary to the decision of the case and therefore constitutes unbinding obiter dictum. The holding that resolved the case in *J.P.* was that the premises there involved were not in fact abandoned. Id. at 895-96. Thus, as a matter of law, there were not facts in the record to support the defense in the first instance. A party is entitled to a jury instruction on its theory of the case if there is sufficient evidence to support the theory. *State v. Ponce,* 166 Wn.App. 409, 415, 269 P.3d 408 (2012). All jury instructions must be supported by substantial evidence

and, in considering the necessary quantum of evidence, the evidence is viewed in the light most favorable to the proponent of the instruction. Id. Philosophical machinations about the common elements of criminal trespass and burglary were unnecessary to the disposition of the matter. The defense was foreclosed as a matter of insufficient factual basis and J.P.'s conviction was affirmed.

Division III again considered this issue in *State v. Ponce,* 166 Wn.App. 409, 269 P.3d 408 (2012). There, the court first addressed the factual basis for the proposed criminal trespass defense instruction and found it to be sufficient. Id. at 416. The trial court had denied an instruction from the statutory trespass defenses that the defendant reasonably believed that the owner or another sufficiently licensed person licensed the defendant to enter or remain. Id at 414-15. The trial court ruled that the instructions as a whole allowed Ponce to argue his theory of the case. Id. Division III retreated from its *J.P.* holding, saying

> In J.P., this court did not hold that a jury must be instructed that the statutory defenses to criminal trespass are also defenses to residential burglary. J.P. was a bench trial; at issue was whether abandonment could be argued to the trial court as a defense. The rationale for this court's decision was not that courts can or should engraft a statutory defense that the legislature has applied to one crime onto a different crime, having similar elements. Rather, J.P. assessed the implications for the defendant of the Supreme Court's decision in *Widell* that the statutory defenses recognized in *Widell* negate the element of unlawfully entering or remaining at a premise.

Id. at 417. Thus, the Court held that its *J.P.* holding is not mandatory. Division III felt that its reasoning about the similitude of elements between criminal trespass and burglary and the operation of a "negates" defense on those same elements is "inescapable." Id. at 418. However, "[w]e believe that their explicit identification as defenses to criminal trespass will weigh heavily in a trial court's decision to instruct on them in a criminal trespass case and has no bearing at all on a court's decision to instruct on them in a burglary case." Thus, in a burglary case, instructions on these defenses are never required. The Court ultimately held, as the trial court had, that all the instructions given allowed the defense to argue its theory and there was no abuse of discretion in declining the instruction. Id. at 420. *See also State v. Cordero,* 170 Wn.App. 351, 370, 384 P.3d 773 (Division III, 2012) ("*J.P.* did not hold or suggest that a defendant charged with burglary was entitled to have an additional jury instruction, addressing a statutory defense that the legislature has provided only for criminal trespass, where the court's jury instructions are already sufficient to apprise the jury of the law and enable the defendant to argue his theory of lawful entry.")

Part of the *Ponce* Court's analysis was based on Division II's decision in *State v. Jensen,* 149 Wn.App. 393, 203 P.3d 393 (2009). In that burglary prosecution, an abandonment instruction had been given in

conjunction with instruction on the lesser-included defense of criminal trespass. Id. at 397. Jensen argued on appeal that under *J.P.* the same defense should have encompassed the burglary charge as well. Id. In rejecting that argument, the Court said

> We observe that while J.P.'s holding has a measure of logical appeal, because burglary and criminal trespass share the same unlawful entry element, the plain language of the statutory defense nevertheless applies that defense only to prosecutions for first degree criminal trespass. As with any other statute, where the language of a statutory defense is clear, its plain language is to be applied as written. Applying the statute as written, we hold that RCW 9A.52.090(1)'s abandonment defense is not available regarding Jensen's charged offense of second degree burglary.

Id. at 400-01 (citation omitted). Further, the Court criticized the *J.P.* Court's reliance on *Widell, supra,* finding that "[n]othing in *Widell* suggests that expansion of those statutory defenses to other crimes is warranted." Id. at 401.

Division I of the Court of Appeals is in accord with *Jensen.* In *State v. Olson,* 182 Wn.App. 362, 329 P.3d 121 (2014), once again the statutory criminal trespass defense of abandonment had been instructed in conjunction with lesser-included trespass crimes and the appellant argued that under *J.P.* it was error that that defense did not encompass the burglary count. The Court held that

> We agree with the analysis in *Jensen.* Under the plain and unambiguous language of the statute, the defense of abandonment applies only to the crime of criminal trespass. The legislature did not provide the statutory defense of abandonment as a defense to

residential burglary, and the supreme court in *Widell* did not hold otherwise.

Id. at 377. Thus two divisions of the Court of Appeals have squarely rejected the *J.P.* holding and Division III has retreated from the holding, subsequently holding that its rule is not mandatory in burglary prosecutions. The continued vitality of *J.P.* as precedent is questionable. Authority from this division forecloses the argument. Noble's argument fails.

C. COUNSEL WAS NOT DEFICIENT WHERE THER WAS AN INUSFFICIENT FACTUAL BASIS FOR GIVING AN INSTRUCTION ON THE STATUTORY DEFENSE OF ABANDONED PORPERTY.

Noble next claims that his counsel was ineffective for not requesting an abandonment instruction on the given lesser-included of criminal trespass. This claim is without merit because the giving of a jury instruction requires that it be supported by substantial evidence and substantial evidence that the house herein was abandoned did not obtain.

As noted above, the trial court refused to instruct the jury on the defense of abandonment to the burglary charge, ruling as a matter of law that that defense applies to criminal trespass only. The trial court did not at that time consider whether or not such an instruction would be supported by sufficient evidence. Since defense counsel failed to offer

such an instruction at the end of the case, the trial court never engaged in an analysis of the possible factual basis for that instruction. Had the trial court done so, it would have concluded that there was not, in fact, a sufficient factual basis for the giving of an abandonment instruction.

`To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient and prejudice. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "Legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel." In re Pers. Restraint of Hubert, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007). In particular with regard to jury instructions "[t]o establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction." *State v. Olson, supra* at 373-74.

Clearly, then, Noble's counsel was not deficient for not proposing the abandoned defense instruction if Noble was not entitled to it.

Each side is entitled to have the jury instructed on its theory of the

> case if there is sufficient evidence to support that theory. Yet all jury instructions must be supported by substantial evidence. When determining whether the evidence was sufficient, the appellate court must view the evidence in the light most favorable to the party that requested the instruction.

State v. Ponce , supra at 415-16 (citation omitted). Further, "a specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case." Id. at 419.

The statutory defenses to criminal trespass are, in relevant part,

> In any prosecution under RCW 9A.52.070 and 9A.52.080, it is a defense that:
>
> (1) A building involved in an offense under RCW 9A.52.070 was abandoned; or
>
> (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
>
> (3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.

RCW 9A.52.090.[1] Perusal of this statute is instructive as to the nature of the defense here in dispute. First, obviously there is no claim here that Mr. Adkins' house was open to the public; subsection (2) has no application to this case. Second, subsection (3) is similarly not applicable here but the point is that it allows a defense based upon a defendant's reasonable belief. But subsection (1) makes no mention of the defendant's

[1] Omitting subsection (4), which deals with process servers.

reasonable belief that the premises were abandoned. It is only a defense that the building "was abandoned." Inclusion of a reasonable belief defense in subsection (3) implies exclusion of it in subsection (1). *State v. Ortega*, 177 Wn.2d 116, 124, 297 P.3d 57 (2013). The statute requires abandonment in fact—reasonable belief of abandonment is not sufficient. In practical terms, this makes sense, because it discourages individuals from entering buildings that are not in fact abandoned, even though they appear to be.

Thus, to be entitled to the abandoned defense, Noble must establish facts that show that the house herein was in fact abandoned. His mere belief on the point is insufficient. The court in *J.P., supra,* affirmed because J.P. could not establish as a matter of fact that the building there was in fact abandoned. 130 Wn.App. at 896. In considering this issue, the *J.P.* Court defined the term, saying

> The trial court allowed J.P. to assert the abandonment defense. It ruled, however, that the house was vacant but not abandoned at the time. "Abandoned" is not defined by the statute. See RCW 9A.52.010, .070. Undefined statutory terms are given their usual and ordinary meaning as may be found in the dictionary. State v. Sunich, 76 Wash.App. 202, 206, 884 P.2d 1 (1994). "Abandon" is defined as "to cease to assert or exercise an interest, right, or title to esp[ecially] with the intent of never again resuming or reasserting it" and "to give up ... by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments." *Webster's Third New International Dictionary* 2 (1993). "Abandoned" is defined as "given up: DESERTED, FORSAKEN <an [abandoned] child> <an [abandoned] house>." Id.

Id. at 895-96. No evidence meeting this definition, aside from Noble's belief, was adduced at trial in the present case.

To the contrary, Mr. Allen testified that he has owned the subject property for five or six years. 2RP 270-71. He had purchased it from the estate of a lady that had passed away for $70,000. 2RP 271. He intended to "fix it up and sell it." Id. The place is structurally sound but needs cleaning up. 2RP 271-72. He has done work on the place and keeps the yard mowed "so it don't over grow everything." 2RP 277. The power and gas were on but the water was turned off to avoid the bill and to fix a washer that does not have a shut-off valve. 2RP 277-78. Mr. Allen had taken measures to keep animals out of the house. 2RP 285. Mr. Allen is in and out of the house all the time. 2RP 326.

Mr. Allen's testimony was unrebutted. From this testimony, it cannot be said that Mr. Allen ceased to assert his right or title to the property with the intent to never assert it in the future. Mr. Allen simply had not deserted or forsaken the property. For his part, Noble asserted that the place looked condemned. 3RP 431. It was "dilapidated." 3RP 433. He saw no furniture or carpet and the place smelled bad. 3RP 433. But none of Noble's testimony rebuts Mr. Allen's interest in the property. Thus, as a matter of fact, Mr. Allen's property was not in fact abandoned; particularly when it is recalled that the abandoned defense does not stand

or fall on Noble's own belief, reasonable or otherwise.

On this record, then, there is no evidence supporting the giving of an abandoned property defense instruction. Given the strong presumption that counsel was effective, it may safely be presumed that defense counsel herein was aware of the lack of factual basis for the giving of the instruction. Thus the failure to offer one was not deficient performance. Noble's ineffective assistance claim fails.

IV. CONCLUSION

For the foregoing reasons, Noble's conviction and sentence should be affirmed.

DATED April 12, 2016.

Respectfully submitted,

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